California Western Law Review

Volume 38 | Number 2 Article 9

2002

Sex on the Internet: A Legal Click or an Illicit Trick?

Matthew Green

SEX ON THE INTERNET: A LEGAL *CLICK* OR AN ILLICIT *TRICK?*

Matthew Green[*]

INTRODUCTION

Due to the influx of reality-based television shows and voyeuristic Web sites that utilize live Web cameras,[1] incidents of Internet users paying to watch cybersex and other sexually titillating activities is at an all-time high. Because of the accessibility of such Web sites to minors, coupled with community morals, several localities are searching for ways to protect minors by eliminating cyberpornography.[2] In an effort to curb these adult-oriented Internet activities, district attorneys could potentially prosecute Web site owners, Web users, and Internet performers under pandering,[3] pimping,[4] and prostitution laws.[5]

---

[*] J.D. Candidate, April 2003, California Western School of Law; B.A., Political Science, University of California, at San Diego, 2000. I would like to thank both Prof. Robert DeKoven and Dr. Frank Miskiel for their assistance.

1. Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 930-31 (2001) (discussing the dramatic increase of reality-based television shows and exhibitionist Web sites, such as VoyeurDorm.com).

2. In order to protect minors from harmful material, Congress has repeatedly enacted legislation, such as the "Communications Decency Act of 1996," which was struck down in violation of the First Amendment. *See generally* Reno v. ACLU (Reno II), 521 U.S. 844 (1997). In response to the ruling, Congress then enacted the "Children Online Protection Act of 1998," which was also found to violate the First Amendment. *See generally* ACLU v. Reno (Reno III), 217 F.3d 162 (3rd Cir. 2000), *cert. granted sub nom.* Ashcroft v. ACLU, 532 U.S. 1037 (2001) (striking down the "Children Online Protection Act" due to the technological difficulties with preventing a Web page from being viewed in a particular locality, such that the "community standards" test for obscenity would "require every Web communication to abide by the most restrictive community's standards"). *See also* Free Speech Coalition v. Reno, 220 F.3d 1113 (9th Cir. 2000), *aff'd sub. nom.* Ashcroft v. Free Speech Coalition, No. 00-795, 2002 WL 552476, at *2 (U.S. Apr 16, 2002) (holding the "Child Pornography Prevention Act of 1996," which banned "virtual" child pornography, including computer-generated images appearing to be children and sexual acts with persons portrayed to be minors, was overbroad and infringed upon protected speech under the First Amendment).

3. Pandering is the act of "persuading or encouraging" another to become a prostitute. CAL. PENAL CODE § 266(i) (West 1999).

4. Pimping occurs when one "lives or deriv[es] support" from a prostitute's "earnings." CAL. PENAL CODE § 266(h) (West 1999).

5. Prostitution is "any lewd act between persons for money or other consideration." CAL. PENAL CODE § 647(b) (West 1999).

This Comment will address the issue of whether a Web user that provides consideration for access to a pornographic Web site and subsequently views a live-sex show, or engages in directing an Internet actor to masturbate, should be prosecuted for prostitution. Part I provides a discussion of the large, almost mainstream adult entertainment industry that exists today. Part II explains the history of prostitution regulation and its justifications in the Twentieth Century. Part III specifically addresses the application of California's prostitution statutes to the Internet. Finally, Part IV analyzes the First Amendment's protection of such adult Web sites and the adult entertainment industry.

There are two scenarios occurring on the Internet that will be discussed. The first is the situation where the Web user pays a fee to direct a Web performer to masturbate. California case law suggests that physical contact between the customer and the actor is probably required for a prostitution conviction,[6] although it is not clear whether physical contact must occur. The second scenario is that of a Web user paying for access to a Web site to view a live sex-show that does involve physical contact between the actors themselves. In California, the hiring of actors to engage in "nonobscene" sexual activities for a film does not constitute prostitution.[7] In Arizona, however, which has a similar prostitution statute to that of California, the "semi-private performance" of women engaging in sexual activities behind a glass window for money in the presence of the customer *has been held to be* prostitution.[8]

It is unclear whether the Internet performances constitute *protected* nonobscene pornographic films or *unprotected* live sex shows. As a result, the answer likely lies behind the public policy that justifies the criminalization of prostitution. Because the traditional policy underlying prostitution statutes is not applicable to the Internet,[9] the live Internet sex shows do not constitute prostitution, and should be protected under the First Amendment.

---

6. *See* People v. Fitzgerald, 165 Cal. Rptr. 271, 272 (Cal. App. Dep't Super. Ct. 1979) (holding that California's prostitution statute disallows "sexually motivated acts," which require a physical "touching") *and* People v. Hill, 163 Cal. Rptr. 99, 105 (Ct. App. 1980) (concluding that "bodily contact between the prostitute and the customer is required"). *But see* People v. Janini, 89 Cal. Rptr. 2d 244, 248, 251 (Ct. App. 1999) (stating that the city attorney's claim that "skin-to-skin contact" is not required is "debatable, to say the least").

7. People v. Freeman, 758 P.2d 1128, 1129 (Cal. 1988).

8. State v. Taylor, 808 P.2d 314, 318 (Ariz. Ct. App. 1990).

9. The lack of physical contact expels traditional prostitution concerns, such as the spread of sexually transmitted diseases, rape, and the safety of the prostitutes. *See* Commonwealth v. Dodge, 429 A.2d 1143, 1149 (Pa. Super. Ct. 1981) (holding that there is a "valid state interest" in prohibiting prostitution because "[p]rostitution is an important source of venereal disease"); *and* Susan E. Thompson, Note, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 240 (2000) (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)).

I. TODAY'S ADULT ENTERTAINMENT INDUSTRY: THRIVING AND GROWING

According to Frank Rich, pornography is "no longer a sideshow to the mainstream . . . it is the mainstream," such that the adult entertainment industry produces between $10 billion and $14 billion in revenues per year in America alone.[10] Many consider this estimate to be inflated, suggesting that the industry actually produces somewhere between $2 billion and $4 billion.[11] Nonetheless, the adult industry produces over $56 billion worldwide[12] and is expected to triple over the next five to seven years.[13]

The migration of adult entertainment into mainstream America is the result of several factors. Beginning in the 1980s with the advent of the Video Cassette Recorder (VCR), adult movies became much more appealing, because they could be viewed in the privacy of the homes as opposed to the very public, potentially humiliating, neighborhood XXX theater.[14] While only 1,275 pornographic videos were released in 1990, that number increased to 8,948 videos in 1998.[15] In that same year, Americans rented over 686 million adult videos.[16] Furthermore, due to the fact that one can simply order adult-oriented programming through his or her cable company on pay-per-view, one does not even need to leave his or her home to rent pornographic movies. Several adult channels, including The Playboy Channel, The Spice Channel, and The Hot Network, are readily available through multiple cable providers from mainstream companies, including General Motors' DirectTV, Time Warner Cable, AT&T Broadband, Cox Communications, Comcast Corporation, Cablevision Systems, Charter Communications, MediaOne, Insight Communications, GTE, SNET, U S WEST, and Echo Star's The Dish Network.[17] Due to the lucrative nature of adult pay-per-view services, these mainstream companies have a large incentive to offer these adult

---

10. Frank Rich, *Naked Capitalists: There's No Business Like Porn Business*, N.Y. TIMES MAGAZINE (May 20, 2001), *at* http://205.182.50.116/Articles/BLHG_New_York_Times_05202001article.htm. *See also* Davide Dukcevich, *Stock Focus: Adult Entertainment Companies*, FORBES.COM (May 23, 2001), *at* http://www.forbes.com/2001/05/23/0523sf.html (where Robert Routh, an analyst from Ladenburg Thalmann stated that adult entertainment sales in the U.S. are over $11 billion).

11. *See* David Ackman, *How Big is Porn?* FORBES.COM (May 25, 2001), *at* http://www.forbes.com/ 2001/05/25/0524porn.html%20 (dismissing the $10 billion figure and replacing it with the $4 billion estimate published in ADULT VIDEO NEWS, an adult industry trade paper, which was obtained from a study conducted by Adams Media Research, Forrester Research, Veronis Suhler Communications Industry Report, and IVD). These studies found that Americans pay between $2.6 billion and $3.9 billion for adult-oriented materials. *Id.*

12. Robert C. Morais, *Porn Goes Public*, FORBES.COM (June 14, 1999), *at* http://www.forbes.com/forbes/1999/0614/6312214a.html%20.

13. Dukcevich, *supra* note 10 (as stated by Robert Routh).

14. *See* Morais, *supra* note 12 (identifying technology, including the VCR and the Internet, as the main contributors to the growth of the adult entertainment industry).

15. *Id.*

16. *Id.*

17. *See* Letter from Daniel E. Somers, President & CEO, AT&T Broadband to Lynn Langmade (Aug. 3, 2000), *at* http://www.spiderwomen.org/campaigns/att/att_ltrtosw.htm.

networks. Cable operators are entitled to approximately eighty percent of the profit, while the network receives only twenty percent of the gross revenue.[18]

Although pay-per-view generates $128 million per year in the U.S., that figure pales in comparison to the revenues from pornography on the Internet, which are estimated at approximately $1 billion in the U.S. alone.[19] According to *Net Ratings*, an Internet research company, 22.9 million Web users visited adult Web sites in April 2001 alone.[20] As stated by Alvin Cooper of Stanford University, "Sex is an integral part of the Internet," such that nine million individuals "log on daily for sexual pursuits."[21]

One popular Web site, which has a market value of over $158 million,[22] is the publicly traded Private Media Group.[23] In addition to the plethora of pictures and adult videos available on the Internet, one of the many Web sites owned by the Private Media Group, Privatelive.com, as well as several of its competitors, also offers live sex shows and interactive masturbation performances to its subscribers for a monthly fee or by the minute.[24] This type of live video streaming is dubbed as "the hottest ticket item among the pornicopia of online products available."[25]

Because Web users provide compensation for these types of sexual activities, district attorneys could potentially target Web site owners and Internet performers for prosecution under pandering, pimping, and prostitution laws, while Web site subscribers, who purchase this type of service, may be prosecuted under solicitation statutes.[26] Several of the forty-nine states that

---

18. Morais, *supra* note 12.

19. *See id.* (as stated by Forrester Research); *and* Ackman, *supra* note 11 (according to Adams Media Research, Forrester Research, Veronis Suhler Communications Industry Report, and IVD).

20. Ackman, *supra* note 11.

21. Raymond McCaffrey, *Sex Sells: Millions Engage in Cybersex*, THE COLO. SPRINGS GAZETTE TELEGRAPH, Mar. 30, 1999, at A1.

22. Dukcevich, *supra* note 10 (as of May 22, 2001, according to Market Guide and FT Interactive Data via FactSet Research Systems).

23. This Spanish company is traded on the NASDAQ, under the ticker symbol "PRVT."

24. *See* Morais, *supra* note 12 (describing adult activities that are commonplace on the Internet).

25. Ron Russell, *On the Internet, Where Porn Means Mega-Profits, L.A.'s Cybermistresses are in the Vanguard of a Boom Industry*, NEW TIMES LOS ANGELES (Sep. 17, 1998), *at* http://www.newtimesla.com/issues/1998-09-17/feature.html/page1.html.

26. *See* James Nahikian, Comment, *Learning to Love "The Ultimate Peripheral"—Virtual Vices Like "Cyberprostitution" Suggest a New Paradigm to Regulate Online Expression*, 14 J. MARSHALL J. COMPUTER & INFO. L. 779, 802 (1996) (identifying the notion of "cyberprostitution," but concluding that prostitution unequivocally requires "direct genital contact"); *Cf.* David Cardiff, Note, *Virtual Prostitution: New Technologies and the World's Oldest Profession*, 18 HASTINGS COMM. & ENT. L.J. 869, 889 (1996) (also discussing the idea of "virtual prostitution," but concluding that prostitution statutes are applicable because "individuals who hire actors and actresses to engage in filmed or photographed sex acts for commercial reproduction can be prosecuted under state pimping, pandering, and prostitution statutes," an idea supported by People ex rel. Van De Kamp v. American Art Enters., Inc., 142 Cal. Rptr. 338 (Ct. App. 1977), a case that is no longer good law, as it was later disapproved in People v. Freeman, 758 P.2d 1128, 1133 (Cal. 1988).

currently outlaw prostitution[27] provide very broad language in their prostitution statutes, where physical contact is not an element of the crime. For example, California's disorderly conduct statute describes "prostitution" as "any lewd act between persons for money or other consideration."[28] In Arizona, prostitution also occurs when a customer pays another to engage in sexual activities with a third person while the customer only views the sexual acts.[29] Prostitution statues vary by state, and evolve with community social mores.

II. THE CRIMINALIZATION OF PROSTITUTION IN AMERICA

During much of the Nineteenth Century, men and women were free to engage in sexual activities, which today would constitute prostitution, in most American cities with minimal fear of any legal repercussions.[30] As the Nineteenth Century drew to a close, several cities, in an attempt to cater to moral concerns of the era, confined brothels to the "red light districts."[31] Under a state's police power, which includes the power to regulate "public morals," states and localities began to exercise their ability to regulate prostitution.[32]

In addition to forcing prostitutes into the "red light" districts, many municipalities attempted to institute various registration schemes, requiring prostitutes to identify themselves to the police.[33] Most cities, however, implemented its police power to criminalize prostitution.[34] For example, in 1912, New York City was home to over 142 brothels; but by 1917, after criminalizing prostitution, only three continued to exist.[35] The federal gov-

---

27. Angie Wagner, *Brothels in Nevada Keep a Low Profile*, THE COLUMBIAN, July 15, 2001 at A12. In Nevada, ten of the seventeen counties permit prostitution. *Id.*

28. CAL. PENAL CODE § 647(b) (West 1999).

29. State v. Taylor, 808 P.2d 314, 315 (Ariz. Ct. App. 1990) (holding that the "performance of sexual acts upon each other for the gratification of customers who pay to watch" constitutes prostitution where customers paid female performers to engage in breast fondling and cunnilingus in a small booth behind a clear glass window).

30. *See* Thompson, *supra* note 9, at 223-24 (citing V. BULLOUGH & B. BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 226 (1987), noting that prostitution was a publicly accepted practice, such that several cities published "official guidebooks" describing the women of local brothels).

31. *Id.* at 224 (explaining that the term "red light district" "derived 'from the practice of trainmen leaving their signal lanterns in front of a house or shack while a making a visit there'") (quoting V. BULLOUGH & B. BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 224 (1987)).

32. *See* People ex rel. Thrasher v. Smith, 114 N.E. 31, 32 (Ill. 1916) (ruling that a state's ability to restrict prostitution is "an exercise of the police power of the state, passed in the interest of the public welfare, for the preservation of good order and public morals").

33. Thompson, *supra* note 9, at 225 (citing V. BULLOUGH & B. BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 225 (1987)).

34. *Id.*

35. *Id.* at 225 (citing V. BULLOUGH & B. BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 228 (1987)).

ernment also instituted moral statutes about the same time. Utilizing the federal power to regulate interstate commerce, Congress passed the Mann Act of 1910, which imposes criminal sanctions against any person that "transports individuals in interstate or foreign commerce" for the purpose of engaging in sexual acts constituting prostitution.[36]

The practice of prostitution became illegal in the Twentieth Century as a result of several public policy concerns. First, fornication violates widely held Judeo-Christian morality, and prostitution statutes attempted to suppress this activity.[37] Second, societal morality stigmatizes the image of women roaming the streets selling sex, in plain view of the general public, and the statutes were intended to dissuade this practice.[38] Third, prostitution statutes were instituted to combat the spread of sexually transmitted diseases (STDs) and to protect the health and safety of the community.[39] Fourth, the criminalization of prostitution was seen as a mechanism to protect the prostitute from being a perpetual victim of violent crimes, including rape, assault, battery, and robbery.[40] Fifth, the statutes were seen as a way to eliminate collateral crime, as prostitution allegedly attracts other forms of criminal behavior, such as drug use, drug dealing, organized crime, and unscrupulous police behavior.[41] Finally, it was believed that prosecuting prostitutes could reduce the number of prostitutes on the street, and subsequently could diminish the number of children who are victims of commercial sexual exploitation.[42] Currently, it is estimated that there are anywhere between a quarter million

---

36. Mann Act, 18 U.S.C. § 2421 (West 2000). *See* United States v. Roeder, 526 F.2d 736, 739 (10th Cir. 1975) (holding that transporting women across state lines for the purpose of making a pornographic film violated the Mann Act).

37. Thompson, *supra* note 9, at 229 (citing JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 39 (1979)).

38. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 529 (2000) (stating that "streetwalkers are the most visible and familiar, . . . comprise only ten to twenty percent of all prostitutes, [but] . . . account for eighty-five to ninety percent of all prostitution arrests").

39. *See* Commonwealth v. Dodge, 429 A.2d 1143, 1147, 1149-50 (Pa. Super. Ct. 1981) (holding that there is a "valid state interest" in prohibiting prostitution because "[p]rostitution is an important source of venereal disease").

40. Thompson, *supra* note 9, at 240 (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)).

41. Thompson, *supra* note 9, at 240 (citing Jessica N. Drexler, *Government's Role in Turning Tricks: The World's Oldest Profession in The Netherlands and United States*, 15 DICK. J. INT'L L. 201, 208 (1996)).

42. Richard J. Estes, Ph.D. & Neil Alan Weiner, Ph.D., *The Commercial Sexual Exploitation of Children in the U.S., Canada, and Mexico*, at http://caster.ssw.upenn.edu/~restes/CSEC_Files/Complete_CSEC_020220.pdf (Sept. 10, 2001) (finding, in their study, that adult prostitution zones allow children to be commercially, sexually exploited because these "markets" exist in low-income areas with cheap motels, areas prevalent with drug use and minors). *See also* Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 n. 60 (1993) (stating that "fourteen is the average age of a woman's entry into prostitution").

and 1.3 million prostitutes that serve over 1.5 million customers each week.[43] Although large, these numbers are dwarfed by the many millions of Web users that daily surf the Web in search of cyber sex.

III. APPLICATION OF PROSTITUTION STATUTES TO THE INTERNET

It is yet to be decided whether a person that provides consideration to gain access to an adult Web site and subsequently views a live-sex show, or directs an Internet performer to masturbate, is engaging in criminal behavior. The types of criminal acts that could potentially be applied to the paying Web user include prostitution, solicitation of prostitution, pimping, pandering, placing or permitting placement of wife in a house of prostitution,[44] keeping or residing in a house used for prostitution,[45] and leasing an apartment with the knowledge that it will be used for prostitution.[46]

A. Prostitution and Solicitation

In California, the Penal Code defines prostitution as "any lewd act between persons for money or other consideration."[47] In order to be prosecuted, one must either solicit, or offer, another to "engage" in prostitution, or accept an offer to participate in acts of prostitution.[48] Secondly, there must be "some act" taken in "furtherance of the commission" of prostitution.[49] Finally, only one of the parties needs "specific intent," and therefore either the offeror's or offeree's intent satisfies the requisite intent for all involved parties.[50] Even with close scrutiny of California's prostitution statute and its interpretation by the courts, it remains ambiguous as to whether the statute requires actual, physical contact.

California's prostitution statute fails to provide a definition of "lewd acts." Other states, including Missouri, include definitions in the prostitution statute requiring bodily contact.[51] Similar to California, Missouri's statute describes prostitution as occurring when one "engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person."[52] To eliminate any ambiguity, however, the Missouri statute identifies "sexual conduct" as "any

43. Thompson, *supra* note 9, at 225 (citing DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 257 (1989)).
44. CAL. PENAL CODE § 266(g) (West 1999).
45. CAL. PENAL CODE § 315 (West 1999).
46. CAL. PENAL CODE § 316 (West 1999).
47. CAL. PENAL CODE § 647(b) (West 1999).
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* MO. ANN. STAT. § 567.020 (West 1999).
52. *Id.* § 567.020(2) (as applied in State v. Burgess, 669 S.W.2d 637, 639 (Mo. App. E.D. 1984)).

touching, manual or otherwise, of the anus or genitals *of one person by another*, done for the purpose of arousing or gratifying sexual desire of either party."[53] As a result, it is clear that Missouri's prostitution offense specifically requires physical contact. The absence of the touching element would therefore excuse the Web site *user* from criminal liability. However, Internet actors engaging in intercourse, oral copulation, or other sexual conduct, still may be liable for prostitution.

Most individuals commonly believe that prostitution consists of sexual intercourse in exchange for money. Because of the broad language in California's statute, however, acts not constituting intercourse do qualify as criminal behavior, and actual sexual intercourse is "not required to be guilty of an act of prostitution."[54] In order to appreciate what acts constitute prostitution, one must examine the California courts' interpretations of "lewd acts."

As defined by the California Supreme Court, the term "lewd conduct," as used in Section 647(a) of the California Penal Code, involves "the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense."[55] Section 647(a)'s definition was later applied to Section 647(b) of the California Penal Code.[56] In *Hill*, the court held that a "lewd act" constitutes prostitution if "the genitals, buttocks, or female breast, of either the prostitute or the customer . . . come into *contact* with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute."[57] Thus, *Hill* suggests a touching is required.

Therefore, although one might argue that the California prostitution statute is vague, it would appear that a prostitution conviction without some bodily contact would be prohibited. Further, *Pryor* specifically holds that, under California's prostitution statute, "sexually motivated acts" require a physical "touching" for prosecution.[58] Moreover, according to California's standard jury instructions for prostitution, a "lewd act" refers to "any act which involves the *touching* of the genitals, buttocks, or female breast of one person by any part of the body of another person and is done with the intent

---

53. *Id.* § 567.020(4)(c) (emphasis added).

54. People v. Dell, 283 Cal. Rptr. 361, 371 (Ct. App. 1991) (affirming a prostitution conviction where undercover police officers investigated an escort service for suspected prostitution).

55. Pryor v. Municipal Court, 599 P.2d 636, 647 (Cal. 1979) (where the court defined "lewd" and "dissolute," as used in CAL. PENAL CODE § 647(a), in upholding a lower court's conviction for solicitation of a "lewd or dissolute" act when the defendant attempted to solicit another to engage in oral sex in a public place). *See also* CAL. PENAL CODE § 647(a) (West 1999) (making it crime to "solicit anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public exposed to public view").

56. *See* People v. Hill, 163 Cal. Rptr. 99, 105 (Ct. App. 1980).

57. *Id.* (emphasis added).

58. *Id. See also* People v. Freeman, 758 P.2d 1128, 1130 (Cal. 1988) (upholding the definition used in both *Pryor* and *Hill*).

to sexually arouse or gratify."[59] Additionally, in October 2001, a California Court of Appeal held that "without sexual contact, there can be no prostitution."[60]

Although the lack of physical contact between the "cyberprostitute"[61] and the customer might allow the Web user to escape criminal sanctions, the Internet performers, who engage in masturbation, intercourse, oral copulation, and other sexual acts, still might be criminally liable for prostitution. According to both *Pryor* and *Hill*, the "touching of the genitals, buttocks, or female breast" is essential in a prostitution conviction.[62] As a result, the physical touching between the live sex performers for "the purpose of sexual arousal or gratification," coupled with the "money or other consideration" that the performer receives from the Web user, may in fact qualify as prostitution.[63] Moreover, it does not matter who actually compensates the prostitute, whether it is the Web user or the prostitute's employer.[64]

To support the idea that the viewing of others engaging in sexual activities constitutes criminal behavior, a California Court of Appeal held that the acts of breast fondling, cunnilingus,[65] and fellatio[66] performed on stage between a paying member of the audience and a stripper constituted acts of prostitution.[67] While this case dealt with sexual relations between a paying customer and the performer, the California Supreme Court has *not* ruled on whether lewd acts between the performers themselves for consideration constitute prostitution.[68] In order to address the scenario that occurs when a Web user views live sex performances on the Internet, one must seek persuasive authority from other states, such as Arizona.

---

59. *See* CALJIC No. 16.420 (as used in People v. Janini, 89 Cal. Rptr. 2d 244, 252-53 (Ct. App. 1999) (emphasis added).

60. Wooten v. Superior Court, 113 Cal. Rptr. 2d 195, 203 (Ct. App. 2001) (holding that prostitution requires physical contact between the prostitute and the customer where undercover officers viewed women in a private booth engaging in sexual activities with one another).

61. *See* Nahikian, *supra* note 26, at 781.

62. People v. Hill, 163 Cal. Rptr. 99, 105 (Ct. App. 1980).

63. *See id.*

64. *See* People v. Fixler, 128 Cal. Rptr 363, 365 (Ct. App. 1976) (holding that "it seems self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution and that situation is not changed by the fact that A may stand by to observe the act or photograph it").

65. Cunnilingus is "a sexual activity involving oral contact with the female genitals. WEBSTER'S NEW WORLD DICTIONARY 338 (3d college ed. 1988).

66. Fellatio is "a sexual activity involving oral contact with the penis." WEBSTER'S NEW WORLD DICTIONARY 498 (3d college ed. 1988).

67. People v. Maita, 203 Cal. Rptr. 685, 688 (Cal Ct. App. 1984) (where the Court of Appeal upheld pimping and pandering convictions of the club owner and stated "that the entertainer cannot have sexual relations with the audience").

68. A recent California Court of Appeal ruling issued on Oct. 30, 2001 was the first California case to address this scenario. *See* Wooten v. Superior Court, 113 Cal. Rptr. 2d 195, 203 (Ct. App. 2001) (concluding that prostitution requires physical contact between the prostitute and the customer).

The Arizona Supreme Court held that persons "perform[ing] sexual acts upon each other for the gratification of customers who pay to watch" constitutes prostitution.[69] In *Taylor*, an adult club contained a "closet-sized" room where its patrons could pay to view through a glass window a woman masturbating or multiple women participating in sexual activities on a bed.[70] The club also permitted customers to masturbate, while the women often performed cunnilingus and fondled each other's breasts.[71]

Similar to the vagueness of California's prostitution statute, Arizona's relevant statute defines prostitution as "engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person."[72] "Sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse" qualifies as "sexual conduct."[73] "Sexual contact" is "any direct or indirect fondling or manipulating of any part of the genitals, anus or female breasts."[74] Despite the fact that the customer is passively participating in a voyeuristic experience, the Arizona statute does *not* require contact between the client and the prostitute. As a result, the act of a customer paying a woman to engage in sexual acts in a motel room with another individual, or in booths separated by glass windows, qualifies as prostitution.[75]

In discussing its rationale, the Arizona Supreme Court addressed the California court's ruling in *Freeman*.[76] In *Freeman*, a pornographic movie producer hired actors to engage in "nonobscene" sexual activities for a film.[77] Because the movie producer did not compensate the actors to perform sexual acts for his own or his actors' "sexual gratification," and the paid actors "were separated from consumers by time and the distancing medium of film," the actors were deemed not to be "prostitutes."[78] In *Taylor*, however, there was no distance in time between the customer and the actors, such that there was a live performance.[79] In its upholding of the prostitution convictions, the Arizona court held that the performances in the booths were *not*

69. State v. Taylor, 808 P.2d 314, 315 (Ariz. Ct. App. 1990).

70. *Id.* The club charged $20 per woman. *Id.*

71. *Id.* at 316. Patrons were usually encouraged to masturbate in order to show they were not police officers. *Id.*

72. *Id.* (citing ARIZ. REV. STAT. § 13-3211(5) (1989)). One notable distinction regarding Arizona's prostitution statute is the inclusion of the phrase "or any other person," which addresses physical contact between the prostitute and any third persons. *See Wooten*, 113 Cal. Rptr. 2d at 204.

73. *Taylor*, 808 P.2d at 316 (citing ARIZ. REV. STAT. § 13-3211(8) (1989)).

74. *Id.* (citing ARIZ. REV. STAT. § 13-3211(9) (1989)).

75. *Id.*

76. *Id.* at 317 (discussing the court's rationale in *Freeman*).

77. People v. Freeman, 758 P.2d 1128, 1129 (Cal. 1988).

78. *Taylor*, 808 P.2d at 317.

79. *Id.*

"public," but rather consisted of "a semi-private performance with an explicitly masturbatory end."[80]

Because California's prostitution statute is similar to that of Arizona, it is conceivable that California courts could convict Web performers that receive compensation to engage in sexual activity in order to fulfill a Web users' voyeuristic desires of prostitution. However, a significant distinction exists between Web users and the customers in the Arizona *Taylor* case. In *Taylor*, the customer was within close physical proximity to the prostitutes. In cyberspace, although the sexual performers may be giving live, "semi-private"[81] presentations like those in *Taylor*, there is potentially a great distance separating the customer from the prostitute. Moreover, like the films in *Freeman*, the customer is viewing the sexual acts through the lens of a Web camera. As a result of the difficulties with defining the Internet medium itself, the uncertainty escalates. A court could reasonably rule that the live Web performances are identical to either the live sex shows in *Taylor* or the adult films in *Freeman*.

The vague and ambiguous language of prostitution statutes only exacerbates the uncertainty. For example, Web sites, such as VoyeurDorm.com, have implemented a "no sex on camera" policy to reduce the risk of criminal liability.[82] As a result of the ambiguity, the resolution of the issue will likely turn on a discussion of public policy, and attempts could be made to invoke local social morals or community standards in order to control activities on the global World Wide Web.

Opponents of cyber pornography would encourage criminal liability. They would probably view prostitution convictions of Web users and Internet performers as a means to reduce the exposure of indecent adult materials to susceptible minors that may have access to these types of services,[83] diminish the potential for these "cyberprostitutes"[84] to be victimized by their pimps, and decrease the amount of immoral behavior on the Internet.[85] They would adopt a very paternalistic view of the Internet and restrict "the adult population . . . to [viewing] only what if fit for children."[86]

Proponents of self-determination and individual liberty would view the Internet more pragmatically. They would see these types of web sites as providing entrepreneurial opportunities to women, many of whom have been

---

80. *Id.* at 318.

81. *Id.* The "semi-private" performance that occurred in the booths in *Taylor* is similar to live performances via the Internet.

82. Ortiz, *supra* note 1, at 934 (quoting Joel Deane, *Cyberporn King's Latest Headline Grabber*, ZDNet News from ZDWire, Oct. 30 1998, where Bruce Hammil, a co-founder of VoyeurDorm.com, stated that his Web site contains "nudity, but no planned sex").

83. *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (recognizing that "there is a compelling interest in protecting the physical and psychological well-being of minors").

84. *See* Nahikian, *supra* note 26, at 781.

85. *See* Thompson, *supra* note 9, at 229.

86. Butler v. Michigan, 352 U.S. 380, 383 (1957).

very successful.[87] For example, twenty-eight-year-old Lori Michaels, the founder of Dreamy.com, is a "self-made millionaire" from the proceeds of her site, where users pay $9.95 per month for access.[88] Other examples include Asia Carrera, a former "pornstar" who grosses approximately $3.6 million each year from her Web site, and Danni Ashe, a retired stripper, whose site generates over five million hits every day.[89]

Additionally, these Web sites combat the social problems and public policy concerns identified with prostitution. Not only do these Web sites eliminate the stigma of women roaming the streets selling sex, but they also protect prostitutes from exploitation by the police.[90] These Web sites might also reduce the number of children that are victims of commercial sexual exploitation. According to Richard J. Estes, Ph.D. and Neil Alan Weiner, Ph.D., runaway teens often turn to prostitution because prostitutes already inhabit the identical low-income areas these displaced teenagers can afford.[91] The adult content Web sites enable street prostitutes to relocate their business onto the World Wide Web in the form of interactive masturbation performances, or live sex shows, thereby potentially decreasing the number of incidents of commercial sexual exploitation of minors.[92]

Moreover, the lack of physical contact dispels traditional prostitution concerns, such as the spread of sexually transmitted diseases, rape, and the safety of the prostitutes.[93] These justifications do not extend to the world of the Internet because of the lack of physical contact or physical proximity between the performer and his or her client. As a result of the inapplicability of traditional justifications for prostitution regulations, public policy suggests that the sexual performances on the World Wide Web do not qualify as prostitution.[94]

---

87. Russell, *supra* note 25.

88. *Id.*

89. *Id.*

90. *See* Thompson, *supra* note 9, at 240 (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)).

91. *See* Estes and Weiner, *supra* note 42.

92. If street prostitutes moved onto the Internet, it is highly probable that the number of prostitutes on the street would decrease. Subsequently, it is logical to assume that a decrease in the number of prostitutes would diminish the exposure of runaway teens to the prostitution lifestyle.

93. *See* Commonwealth v. Dodge, 429 A.2d 1143, 1147, 1149 (Pa. Super. Ct. 1981); *and* Thompson, *supra* note 9, at 240 (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)).

94. Nahikian, *supra* note 26, at 803 (concluding that "the Government's traditional government rationales for criminalizing prostitution do not apply to cyberprostitution"). Additionally, according to a recent California Court of Appeal decision, prostitution requires physical contact between the prostitute and the customer. Wooten v. Superior Court, 113 Cal. Rptr. 2d 195, 203 (Ct. App. 2001).

Even if the Web performers' activities may constitute prostitution, several of these actors are beyond the jurisdiction of American laws, because these sexual acts occur in foreign countries.[95] For example, the live sex shows that occur on Private Media Group's Web site, Privatelive.com, occur in Barcelona, Spain.[96] Although the actual sex act occurs outside the U.S., the American Web user that views or interacts with the sexual performer in Spain still may be guilty of solicitation of prostitution.

Section 647(b) of the California Penal Code makes prostitution illegal, and it also prohibits the "solicitation of prostitution."[97] The act of "solicitation" refers to "an offer to pay or accept money in exchange for sex."[98] Solicitation, under the California prostitution statute, applies to both the customer and the prostitute.[99] Moreover, following the offer, or solicitation, there must be some "overt act in furtherance of that agreement," which eliminates ambiguous statements leading to false arrests.[100]

For example, in *Wisconsin v. Kittilstadt*, the Wisconsin Supreme Court held that the offering of money to foreign exchange students to have sex with girls in front of the defendant constituted "solicitation of prostitution."[101] Similar to California's solicitation statute, Wisconsin makes it a crime if any person "has or offers to have or requests to have nonmarital sexual intercourse for anything of value."[102] Like the scenario in *Kittilstad*, a Web user's payment of a membership fee in order to view a live sex show may constitute solicitation. Some of these Web viewers pay up to $49.95 for a 20-minute show.[103] As a result, so long as the Web performers engage in sexual acts either before or after the Web user agrees to pay for such services, that Web user's activities will likely violate prostitution statutes. It is unclear whether payment of a fee to gain access to view a performance already in progress, and not at the request of the Web user, would constitute solicitation.

---

95. *See* Cardiff, *supra* note 26, at 896-97 (discussing the idea that video phone dial-a-porn actors "located in a county in Nevada where prostitution is legal" will not be prosecuted for pornography, while the caller may actually be prosecuted under his or her state statute for solicitation of prostitution).

96. *See* Morais, *supra* note 12.

97. CAL. PENAL CODE § 647(b) (West 1999).

98. BLACK'S LAW DICTIONARY 1398 (7th ed. 1999).

99. Leffel v. Municipal Court, 126 Cal. Rptr. 773, 777 (Ct. App. 1976) (holding that "all persons, customers as well as prostitutes, who solicit an act of prostitution are guilty of disorderly conduct").

100. *In re* Cheri T., 83 Cal. Rptr. 2d 397, 402 (Ct. App. 1999) (concluding that it does not matter whether the act or the agreement occurs first).

101. Wisconsin v. Kittilstad, 603 N.W. 2d 732, 738 (Wis. 1999).

102. WIS. STAT. ANN. § 944.30 (West 1996).

103. Russell, *supra* note 25.

B. Pimping

The crime of pimping, according to the California Penal Code, prohibits "any person, knowing another person is a prostitute, from living or deriving support or maintenance . . . in the earnings or proceeds of the person's prostitution."[104] Unlike prostitution and solicitation, which are misdemeanors, pimping is a felony, and an offender may be incarcerated for up to six years.[105] As used in Section 266(h) of the California Penal Code, "prostitution" occurs when the "genitals, buttocks, or female breasts, of either the prostitute or the customer come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute," suggesting that physical contact is required.[106] Due to the fact that the Web site owner receives financial support from the Web site performer's sexual activities, the Web site owner may be held liable for pimping, but only if the owner "knows" the performer is a "prostitute."

C. Pandering

Pandering, which is also a felony punishable by up to six years of jailtime, is the act of "persuading or encouraging" another to become a prostitute.[107] Similar to pimping, a Web site owner may fear potential prosecution under pandering statutes. For example, if a Web site owner were to "encourage" a young man or women to engage in sexual acts constituting prostitution, then that Web site owner may be criminally liable under pandering statutes.

In *Freeman*, where a pornographic movie producer hired actors to engage in nonobscene sexual activities for a film,[108] the movie producer faced pandering charges.[109] In order to prosecute an individual for pandering, the prosecutor must initially prove the occurrence of acts of prostitution.[110] Because Section 266(i) fails to define "prostitution," the court, in *Freeman*, looked to the State's prostitution statute, Section 647(b), in order to ascertain

---

104. CAL. PENAL CODE § 266(h) (West 1999). *See* People v. Maita, 203 Cal. Rptr. 685, 688 (Cal Ct. App. 1984) (upholding pimping and pandering convictions of a club owner where the owner permitted and encouraged performers to "have sexual relations with the audience").

105. CAL. PENAL CODE § 266(h) (West 1999).

106. People v. Hill, 163 Cal. Rptr. 99, 105 (Ct. App. 1980).

107. *See* CAL. PENAL CODE § 266(i) (West 1999).

108. People v. Freeman, 758 P.2d 1128, 1129 (Cal. 1988). Obscenity is not required for a prostitution conviction. State v. Taylor, 808 P.2d 314, 319 (Ariz. Ct. App. 1990). Obscene acts, however, are punishable under a different statute. *See* CAL. PENAL CODE § 311 (West 1999).

109. *Freeman*, 758 P.2d at 1129.

110. CAL. PENAL CODE § 266(i) (West 1999). Pandering, a felony, is much more serious of a crime than prostitution, only a misdemeanor, as evidenced by its much lengthier jailtime. *Id.*

whether the compensated sexual activities constituted prostitution.[111] Due to the fact that paying actors to perform nonobscene sexual acts on film did not qualify as prostitution, the movie producer did not "engage in . . . the requisite conduct" for a pandering violation.[112]

D. Related Prostitution Crimes

Other prostitution-related offenses in California include placing or permitting placement of wife in a house of prostitution,[113] keeping or residing in a house used for prostitution,[114] and leasing an apartment with the knowledge that it will be used for prostitution.[115] According to Section 266(g) of the California Penal Code, any husband that "places or leaves" his wife at a "house of prostitution," . . . or "permits" his wife to "remain" in a "house of prostitution" is "guilty of a felony," subject to three to four years of prison-time.[116] As a result, if the location of Webcasted sexual activities constitutes a "house of prostitution,"[117] then a husband that "knowingly"[118] allows his wife to "stay" there is criminally liable. Although Section 266(g) can still be found in the California Penal Code, its archaic nature has limited its use in recent times.

Under Section 315 of the California Penal Code, it is a misdemeanor to "keep" or "willfully reside" in a house used for prostitution.[119] As a result of this criminal statute, a person that maintains a facility with the knowledge that it will be used for the Webcasting of sexual activities constituting prostitution is in violation of this statute. In addition, the leasing of property with the knowledge that it will be used for prostitution is a misdemeanor.[120] Consequently, the lessor of any commercial or residential space with the knowledge that it is used for "cyberprostitution"[121] is potentially guilty of a crime. Pimping, pandering, prostitution and solicitation of prostitution statutes could be used to impose liability only upon the Web user, the Web site owner, and the Web performers. However, these other related statutes could

---

111. *Freeman*, 758 P.2d at 1130.

112. *Id.* at 1131. The payment made to the actors did not constitute prostitution because the provided consideration was not "for the purpose of sexual arousal or gratification, his own or the actors'." *Id.*

113. CAL. PENAL CODE § 266(g) (West 1999).

114. CAL. PENAL CODE § 315 (West 1999).

115. CAL. PENAL CODE § 316 (West 1999).

116. CAL. PENAL CODE § 266(g) (West 1999).

117. *See* People v. Head, 304 P.2d 761, 764 (Ct. App. 1956) (defining a "house of prostitution" as any location where a "prostitute plies her trade").

118. *See id.* at 766 (upholding a jury instruction allowing an acquittal if the husband is "without knowledge" that acts of prostitution occur at a "house of prostitution").

119. CAL. PENAL CODE § 315 (West 1999).

120. CAL. PENAL CODE § 316 (West 1999).

121. Nahikian, *supra* note 26, at 781.

also extend the reach of law enforcement to hold husbands of the Web performers, the property owners, and property lessors criminally liable as well.

Another Internet activity subject to potential prosecution as prostitution is the sale of women from Eastern Europe and Asia.[122] The Internet provides a forum for companies that provide "mail-order brides" and "sex tours" to market their service to potential customers.[123] These services include trips to the Caribbean and the Far East for the purpose of engaging in sexual activities with young, foreign girls.[124] Through such Web sites, the customer can select a specific girl from a gallery of pictures depicting various girls performing sexual acts.[125] Such services could be construed as utilizing the Internet for the purpose of prostitution. However, because the actual sexual act occurs outside the U.S. borders, the customer potentially may only be liable for solicitation of prostitution.[126]

IV. FIRST AMENDMENT PROTECTION

In analyzing whether certain sexual activities on adult Web sites charging a fee constitute prostitution, it is necessary to address whether the First Amendment protects such activities. It is well established that the First Amendment does not protect "obscene" content or behavior.[127] In *Miller*, the Court laid out a three-prong test for determining obscenity.[128] A work is obscene if the "average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest," "the work" is "patently offensive," and "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[129] Any material that encompasses all three of the elements is not protected by the First Amendment and will violate state obscenity laws.[130]

California defines "obscene" to be any matter that depicts "a shameful or morbid interest in nudity, sex, or excretion" with no "redeeming social importance."[131] The First Amendment, however, shields viewing "obscene

122. Emily Rose, *Focus on Cyberporn; Bride Buying, Sex Services Fueling Calls for Laws*, THE ATLANTA JOURNAL AND CONSTITUTION, Nov. 28, 1995, at 20A.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Cardiff, *supra* note 26, at 896-97 (identifying the notion that only one party may be susceptible to criminal prosecution under his or her state statute for solicitation of prostitution).

127. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957); *and* Miller v. California, 413 U.S. 15, 23 (1973).

128. *Miller*, 413 U.S. at 24.

129. *Id.*

130. *See* CAL. PENAL CODE § 311.2(a) (West 1999) (making it a misdemeanor to "knowingly distribute obscene matter" and held constitutional in *Miller*).

131. CAL. PENAL CODE § 311 (West 1999).

matter" in one's own residence.[132] Moreover, although "obscene" material is not protected as free speech, the First Amendment safeguards "*indecent* sexual expression."[133]

Due to the fact that most pornographic films, "taken as a whole," contain at least some minimal plotline, adult movies possess some "artistic value."[134] As a result, the First Amendment usually shields pornographic movies. "Isolated shots of highly sexual materials . . . seen as a reduction of focus to the sex act itself," which are not "part of any story," like brief clips offered on several adult Web sites, however, lose their "artistic value."[135] Many of the live sex services fall in between the full-length films and the actual sex scene. So long as the live sex performance maintains some artistic value, such as including a storyline for the audience, these services are less likely to be found obscene. Although the First Amendment protects nonobscene speech, proof of obscenity is *not* required for a prostitution conviction.[136]

It is well established that "live theatrical performances" are protected by the First Amendment.[137] In order to analyze whether regulations that restrict "conduct" containing both "speech" and "nonspeech" elements, such as prostitution statutes, do not violate the First Amendment, the U.S. Supreme Court, in *O'Brien*, implemented four factors to take into consideration:

> (1) whether the regulation is within the constitutional power of the government, (2) whether the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest.[138]

---

132. *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (although the home has a protected privacy interest, one can still be convicted under obscenity statutes for purchasing the obscene material).

133. Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

134. Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 370 (citing LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 257-58 (1995)), who stated that most courts would *not* "conclude that a video taken as a whole, lacks serious artistic value").

135. *Id.* (quoting LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 258 (1995)).

136. State v. Taylor, 808 P.2d 314, 319 (Ariz. Ct. App. 1990).

137. *See* Barrows v. Municipal Court, 464 P.2d 483, 487, 489 (Cal. 1970) (holding that the application of CAL. PENAL CODE § 647(a), which makes it a crime to "solicit anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public exposed to public view," did *not* apply to the producer and director of a live stage play containing sexual conduct because it "would have an inhibiting effect upon the exercise of First Amendment rights").

138. United States v. O'Brien, 391 U.S. 367, 377 (1968). The regulation of "content" by itself demands "strict scrutiny" analysis. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (holding that the strict scrutiny standard must be applied to any "regulations that sup-

In *Freeman*, the court applied the *O'Brien* factors in its discussion of pandering charges against the producer and director of a commercial film containing hired actors engaging in sexual activities.[139] The court assumed that the statute was within the Legislature's constitutional power and deemed the governmental interests of preventing profiteering from prostitution and curtailing the spread of AIDS and other STDs to be "important."[140] Under the third factor, however, the "punishment of a motion picture producer for the making of a nonobscene film" had virtually nothing to do with "the purpose of combating prostitution."[141]

The court held that the prosecutor was merely using the pandering statute to "prevent profiteering in *pornography*," not prostitution.[142] Moreover, because the prosecution acknowledged that no prostitution would have occurred had the actors not been paid, the "public health" interest was also "not credible."[143] Additionally, regarding the fourth factor, the court recognized that identifying paid actors in a "nonobscene motion picture" as "prostitutes" would have a widespread "sweeping" effect upon all films, including "films of unquestioned artistic and social merit, as well as films made for medical or educational purposes."[144]

While the First Amendment protects nonobscene films,[145] live "theatrical performances" that involve sexual contact between either the consumer and the performer[146] or multiple performers[147] do *not* qualify as protected speech. In *Taylor*, while analyzing prostitution charges against performers engaging in "sexual contact" in plain view of paying strip club patrons, the Arizona Supreme Court applied the *O'Brien* factors.[148] Similar to *Freeman*, the court identified the State's power to regulate prostitution,[149] as well as the State's substantial interests in regulating prostitution.[150] Unlike *Freeman*,

---

press, disadvantage, or impose differential burdens upon speech because of its content"). Every piece of legislation must protect a "narrowly-tailored" compelling government interest, such that there are no less-restrictive alternatives. *See generally* Reno v. ACLU (Reno II), 521 U.S. 844 (1997).

139. People v. Freeman, 758 P.2d 1128, 1132 (Cal. 1988).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.*

146. *See* People v. Maita, 203 Cal. Rptr. 685, 688 (Cal Ct. App. 1984).

147. State v. Taylor, 808 P.2d 314, 319 (Ariz. Ct. App. 1990).

148. *Id.* at 317. The court pointed to the fact that, when particular conduct contains both "speech" and "nonspeech" components, a "sufficiently important governmental interest" supporting the "nonspeech" component may "justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

149. *Taylor*, 808 P.2d at 317 (citing State v. Green, 131 P.2d 411, 412 (Ariz. 1942) recognizing that prostitution is "an evil over which the legislature has almost plenary power").

150. *Id.* The State's rationales for regulating prostitution included "preventing communicable disease, preventing sexual exploitation, and reducing the assorted criminal misconduct

the court held that the State's "public health" concerns were legitimate and were "wholly unrelated to suppressing free expression."[151]

Regarding the fourth element, the court held that the "incidental impingement on First Amendment freedoms" is *not* "greater than essential to further the governmental interests at stake,"[152] and rejected the argument that "protected theatrical expression will suffer if the state prosecutes erotic performance as prostitution."[153] Although this argument was persuasive in *Freeman*, *Taylor* was distinguishable because the paid performers in the booths were *not* "separated from consumers by time and the distancing medium of film."[154] The court, as a result, concluded that *Taylor* parallels *Maita* because of "the presence of the consumer,"[155] and held that the conviction of the booth performers was proper under the *O'Brien* analysis.[156]

Because Web performers are giving live, "semi-private"[157] presentations like those in *Taylor*, California courts could potentially convict Web performers that receive compensation to engage in sexual activity in order to fulfill a Web users' voyeuristic desires of prostitution.[158] In *Taylor*, however, which relied upon *Maita*, the customer was within close physical proximity to the prostitutes.[159] To the contrary, the cyberspace consumer is *not* physically present where the sexual acts occur.

Moreover, like the films in *Freeman*, the customer is viewing the sexual acts through the lens of a Web camera. Additionally, the Internet's lack of physical contact dispels several public health prostitution concerns, including the spread of STDs, rape, and the safety of the prostitutes.[160] The strong resemblance to *Freeman*, coupled with the elimination of traditional public

---

that tends to cluster with prostitution." *Id.*

151. *Id.*

152. *Id.*

153. *Id.* This argument was presented and accepted in People v. Freeman, 758 P.2d 1128 (Cal. 1988).

154. *Taylor*, 808 P.2d at 317.

155. *Id.* at 318. *See* People v. Maita, 203 Cal. Rptr. 685, 688 (Cal Ct. App. 1984) (holding that sexual acts performed on stage between a paying member of the audience and a stripper constituted acts of prostitution).

156. *Taylor*, 808 P.2d at 319.

157. *Id.* The "semi-private" performance that occurred in the booths in *Taylor* is similar to live performances via the Internet.

158. Under the rationale of a recent California Court of Appeal ruling, however, the viewing of others engaging in sex via the Internet is not prostitution due to the lack of physical contact between the prostitute and the customer. Wooten v. Superior Court, 113 Cal. Rptr. 2d 195, 203 (Ct. App. 2001).

159. *Taylor*, 808 P.2d at 318-19.

160. *See* Commonwealth v. Dodge, 429 A.2d 1143, 1149 (Pa. Super. Ct. 1981); Thompson, *supra* note 9, at 240 (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)); *and* Nahikian, *supra* note 26, at 803 (concluding that "the Government's traditional government rationales for criminalizing prostitution do not apply to cyberprostitution").

policy concerns, indicates that the sexual performances on the World Wide Web do not qualify as prostitution, and should be immune from prosecution.

CONCLUSION

It remains undecided by the courts whether a person that provides consideration to gain access to an adult Web site and subsequently views a live-sex show, or directs an Internet performer to masturbate, is engaging in criminal behavior. Because the lack of physical contact is inherent in Internet communications, the scenario of a Web user paying a fee to direct a "cyberprostitute"[161] to masturbate does not constitute an act of prostitution.[162] Similarly, the strong resemblance of communication mediums between the Internet and motion pictures, such that the Web consumer is *not* physically present where the sexual acts occur and views the sexual performance through the lens of a Web camera, coupled with the elimination of traditional public policy concerns, such as the spread of STDs, rape, and the safety of the prostitutes,[163] indicates that the performance of live sexual acts of performers via the World Wide Web does *not* qualify as prostitution. Hence, paternalistic attempts to utilize prostitution statutes to curb sexual activities on the Internet should be thwarted. Consequently, the live video streaming of sex will remain "the hottest ticket item among the pornicopia of online products available."[164]

161. *See* Nahikian, *supra* note 26, at 781.

162. *See* People v. Hill, 163 Cal. Rptr. 99, 105 (Ct. App. 1980) (holding that the "touching of the genitals, buttocks, or female breast" is essential in a prostitution conviction).

163. *See Dodge*, 429 A.2d at 1149; Thompson, *supra* note 9, at 240 (citing Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 201 (Frederique Delacoste & Priscilla Alexander eds., 1987)); *and* Nahikian, *supra* note 26, at 803 (concluding that "the Government's traditional government rationales for criminalizing prostitution do not apply to cyberprostitution").

164. Russell, *supra* note 25.